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6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF NEVADA**

8 In re:
 9 MEDIZONE INTERNATIONAL, INC.,

10 Debtor.

Case No. BK-S-18-12662-LEB

Chapter 7

11 **APPLICATION TO EMPLOY
 12 CASSAN MACLEAN AS
 13 SPECIAL LITIGATION COUNSEL
 14 FOR MAINTENANCE OF
 15 PATENT RIGHTS PURSUANT TO
 16 11 U.S.C. §327(e)**

17 Hearing Date: July 19, 2018

18 Hearing Time: 11:00 a.m.

19 Lenard E. Schwartzer, Chapter 7 Trustee (the “Trustee”) for the above-captioned
 20 bankruptcy case, respectfully requests that this Court approve the engagement of the law firm
 21 CASSAN MACLEAN (“Proposed Special Counsel”) as special litigation counsel to the Trustee *nunc*
 22 *pro tunc* to June 8, 2018, pursuant to section 327(a) and 328(a) of the Bankruptcy Code and
 23 Bankruptcy Rule 2014(a). The Trustee proposes to engage the law firm of CASSAN MACLEAN for
 24 maintenance of the patent rights held by the bankruptcy estate through mid-September 2018 in
 25 exchange for advance payment of USD\$13,000.00. The employment terms are set forth with
 26 more particularity in this Application and patent summary attached as **Exhibit “1.”**

27 This Application is also based upon the *Declaration of P. Scott Maclean* (the “Maclean
 28 Declaration”) filed concurrently with this Application, and the following Points and Authorities.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. CASE BACKGROUND

1. On April 18, 2018, creditors Edwin G. Marshall and Dr. Jill C. Marshall (collectively, the “Marshalls”), and creditor Ushio America, Inc. (together with the Marshalls, the “Petitioning Creditors”), filed an involuntary petition under Chapter 11 the Bankruptcy Code against Debtor MEDIZONE INTERNATIONAL, INC. (the “Debtor”) in Reno, Nevada, thereby commencing bankruptcy case number 18-50412-GWZ (the “Involuntary Chapter 11 Case”).

2. On May 8, 2018 (the “Petition Date”), the Debtor filed its own voluntary case pursuant to Chapter 7 of the Bankruptcy Code in Las Vegas, Nevada [ECF No. 1], and the Trustee has been appointed to administer this Chapter 7 estate.

3. The Trustee has been granted authorization to operate the business for approximately 90 days from June 1, 2018 through August 31, 2018 [ECF No. 36], and has been authorized to borrow up to \$200,000.00 from the Marshalls to fund said operation [ECF No. 40].

4. The Debtor's most recent Form 10-K annual report filed March 20, 2018, with the United States Securities and Exchange Commission indicates the assets of the bankruptcy estate include a number of patents registered in the United States, Europe (, United Kingdom, France, Germany), Canada, China, Hong Kong, Singapore and Mexico, and that the Debtor has two patent applications pending in 38 countries that are parties to the EU Patent Treaty as well as South Korea, India and, Singapore, Brazil and Mexico. *See also* excerpt of Schedule B and related exhibit "B" [ECF No. 1] attached to this Application as **Exhibit "2."**

5. Up to the Petition Date, the Debtor employed Proposed Special Counsel to provide patent agency and legal services to the Debtor. These services comprised patent application filing and prosecution activities before the World Intellectual Property Office (“WIPO”), the U.S. Patent & Trademark Office, the Canadian Patent Office, the European Patent Office and various individual national patent offices in respect of about half a dozen inventions. Such activities

1 included coordinating consultations and actions, in countries other than Canada, via foreign patent
 2 agency and legal firms. Prosecution activities typically involved monitoring progress of the
 3 applications before the patent offices concerned and then considering objections encountered,
 4 making recommendations to Medizone and then preparing and filing formal responses. Proposed
 5 Special Counsel also monitored and maintained formal requirements in the applications over time,
 6 including managing periodic maintenance fee (e.g. annuity) payments. *See* Maclean Declaration.

7 6. Attached as **Exhibit “1”** is a chart of all maintenance fees and annuities that are
 8 expected to come due through mid-September 2018 (the “Patent Expenses”), and includes matters
 9 that the Trustee proposes to have Proposed Special Counsel service during the 90-day period of
 10 the trustee’s limited operations (June 1, 2018 through August 31, 2018).

11 7. The Patent Expenses add up to CA\$15,700 (approximately USD\$12,098), and
 12 include government fees, foreign associates’ fees, and Proposed Special Counsel’s fees. Except
 13 for the Canadian Patent (for which Proposed Special Counsel deals with the Canadian Patent
 14 Office directly) Proposed Special Counsel deals with patent agency firms or specialty annuity
 15 firms to arrange for timely payments to the foreign governments concerned. Payments in advance
 16 are usually required to secure timely payments. Untimely instructions and/or payment may result
 17 in additional urgency charges by the firms involved, which charges are speculative, highly
 18 variable, and accordingly not included in the above estimates. *See* Maclean Declaration. As such,
 19 the Trustee has determined that prompt employment of Proposed Special Counsel will reduce the
 20 estate’s exposure to potential urgency charges.

21 8. Proposed Special Counsel currently asserts an unsecured pre-petition claim for
 22 attorney’s fees in the sum of approximately US\$15,000 for prepetition services, but Proposed
 23 Special Counsel has determined that (due to their limited role) this does not present a conflict. It
 24 is in Proposed Special Counsel’s interest to help maintain the value of the intellectual property
 25 assets for liquidation. *See* Maclean Declaration.

26 9. As the providers of post-petition financing to the estate, the Marshalls have
 27 considered and support the employment of Proposed Special Counsel, and have agreed to advance
 28 the sum of USD\$13,000.00 to Proposed Special Counsel (the “Advanced Funds”) to maintain the

1 estate's patent rights. The funds paid to the firm will be deemed an advance against the loan to the
2 bankruptcy estate from the Marshalls pursuant to the post-petition financing agreement with the
3 Trustee [ECF No. 40].

4 10. Proposed Special Counsel has the advantage of already being extremely familiar
5 with the estate's patent portfolio, and the firm's work will be limited to maintaining the current
6 patent rights. The firm is willing and able to begin work immediately upon deposit of the
7 advanced funds (USD\$13,000.00) and filing of this Application. *See* Maclean Declaration.

8 11. The payment of any additional amount to Proposed Special Counsel will require
9 separate approval by the Trustee, and also by this Court pursuant to 11 U.S.C. §330. *See* Maclean
10 Declaration.

11 12. The Trustee has concluded that engagement of Proposed Special Counsel pursuant
12 to the terms set forth above is reasonable and in the interest of the estate and its creditors.

Memorandum Of Law

I. Basis for Retention of Special Litigation Counsel

15 11. U.S.C. § 327(a) authorizes employment of professionals, including counsel, who do
16 not represent adverse interests to the estate and provides:

17 Except as otherwise provided in this section, the trustee, with the
18 court's approval, may employ one or more attorneys, accountants,
19 appraisers, auctioneers, or other professional persons, that do not
20 hold or represent an interest adverse to the estate, and that are
disinterested persons, to represent or assist the trustee in carrying out
the trustee's duties under this title.

11 U.S.C. §327(e) authorizes employment of special purpose professionals when it is in
the best interest of the estate and provides:

23 The trustee, with the court's approval, may employ, for a specified
24 special purpose, other than to represent the trustee in conducting the
25 case, an attorney that has represented the debtor, if in the best
26 interest of the estate, and if such attorney does not represent or hold
any interest adverse to the debtor or to the estate with respect to the
matter on which such attorney is to be employed.

27 | //

28 | //

1 11. U.S.C. § 328(a) provides guidance regarding compensation of the professionals:

2 The trustee, or a committee appointed under section 1102 of this
 3 title, with the court's approval, may employ or authorize the
 4 employment of a professional person under section 327 or 1103 of
 5 this title, as the case may be, on any reasonable terms and conditions
 6 of employment, including on a retainer, on an hourly basis, on a
 7 fixed or percentage fee basis, or on a contingent fee basis.

8 Notwithstanding such terms and conditions, the court may allow
 9 compensation different from the compensation provided under such
 10 terms and conditions after the conclusion of such employment, if
 11 such terms and conditions prove to have been improvident in light of
 12 developments not capable of being anticipated at the time of the
 13 fixing of such terms and conditions.

14 Section 328 permits a professional to have the terms and conditions of its employment pre-
 15 approved by a bankruptcy court, such that the bankruptcy court may alter agreed upon
 16 compensation only "if such terms and conditions prove to have been improvident in light of
 17 developments not capable of being anticipated at the time of fixing such terms and conditions." In
 18 re Circle K, Corp., 279 F.3d 669, 671 (9th Cir. 2002).

19 As the Trustee's special counsel, Proposed Special Counsel will render legal advice and
 20 perform legal services to Trustee for maintenance of the estate's patent rights. The firm's fees for
 21 such service in the sum of USD\$13,000.00 will be paid from an advance by the Marshalls
 22 pursuant to the post-petition financing agreement with the Trustee [ECF No. 40]. The Trustee has
 23 concluded this arrangement is in the best interest of the estate and creditors because it will benefit
 24 other creditors by preserving the value of the estate's assets pending liquidation.

25 **II. Disinterestedness and Disclosure of Connections**

26 **A. Disinterested Pursuant to 11 U.S.C. §101(14)**

27 To the best of its knowledge, Proposed Special Counsel is disinterested within the meaning
 28 of Section 101(14) of the Bankruptcy Code **except as set forth herein**. Proposed Special
 Counsel, its shareholders, counsel and associates (a) are not creditors, equity security holders, or
 29 insiders of the Debtor; (b) are not and were not, within two years before the date of the debtor's
 30 bankruptcy petition, a director, officer, or employee of Debtor; and (c) do not hold an interest
 31 materially adverse to the interest of the estate or of any class of creditors or equity holders by

1 reason of any direct or indirect relationship to, connection with, or interest in, the Debtor, or for
 2 any other reason, **except as stated herein**. (See Maclean Declaration.)

3 **In particular, Proposed Special Counsel represented the Debtor as patent counsel**
 4 **prior to the Petition Date, and has a pre-petition unsecured claim for unpaid fees that may**
 5 **be asserted against the bankruptcy estate. Additionally, the firm conducted U.S. patent**
 6 **work for the Debtor through an associate patent law firm, Durham Jones Pinegar. Durham**
 7 **Jones Pinegar is listed as a creditor in this case but not for work involving Proposed Special**
 8 **Counsel. (See Maclean Declaration.)**

9 **B. Disclosure of Connections Pursuant to FRBP 2014(a)**

10 To the best of its knowledge, neither Proposed Special Counsel nor any member of
 11 Proposed Special Counsel, have any connections with the Debtor, creditors, or any other party in
 12 interest, their respective attorneys and accountants, the United States Trustee, or any person
 13 employed in the Office of the United States Trustee in this case or in matters upon which Proposed
 14 Special Counsel in this case, **except as set forth herein**. (See Maclean Declaration.)

15 Pursuant to FRBP 2014(a), this application is accompanied by the Maclean Declaration
 16 which constitutes a verified statement and sets forth, to the best of the declarant's knowledge, the
 17 connections, if any, with the Debtor, creditors, any other party in interest, their respective
 18 attorneys and accountants, the United States Trustee, or any person employed in the office of the
 19 United States Trustee in this case. Proposed Special Counsel will supplement these disclosures in
 20 the event further connections are discovered regarding persons or entities that later become
 21 identified as appropriate for disclosure. (See Maclean Declaration.)

22 **C. No Adverse Interest Pursuant to 11 U.S.C. §327(a) and §327(e)**

23 To the best of their knowledge, neither Proposed Special Counsel, nor any member of the
 24 firm, hold or represent any interest that is adverse to the Debtor or to the estate with respect to the
 25 matters for which they are being employed, and they are disinterested pursuant to 11 U.S.C.
 26 §101(14) as set forth above. (See Maclean Declaration.)

1 Accordingly, the Trustee has determined that, to the best of his knowledge, Proposed
 2 Special Counsel, and its partners and associates, are disinterested persons as that term is defined in
 3 11 U.S.C. § 101(14) and pursuant to Fed.R.Bankr. P. 2014(a).

4 Normally, special purpose employment is granted under § 327(e) of the Bankruptcy
 5 Code. That section allows the Trustee to employ “an attorney that has represented
 6 the debtor ... if such attorney does not represent or hold any interest adverse to the
 7 debtor or to the estate with respect to the matter on which such attorney is to be
 8 employed.” § 327(e). As stated in its legislative history, § 327(e) is “most likely
 9 be used when the debtor is involved in complex litigation, and changing
 10 attorneys in the middle of the case after the bankruptcy case has commenced
 11 would be detrimental to the progress of that other litigation.” House Report
 12 No. 95-595, 95th Cong., 1st Sess. 328 (1977); Senate Report No. 95-989, 95th
 13 Cong., 2d Sess. 38 (1978).

14 In re Buffalo Coal Co., No. 06-366, 2008 WL 1925152, at *2 (Bankr. N.D. W.Va. 2008).

15 Subject to the Court’s approval of this Application, Proposed Special Counsel is willing to
 16 serve as the Trustee’s special counsel to perform the legal services described above and the firm
 17 will strive to insure that Proposed Special Counsel’s employment will not be duplicative of the
 18 role of the Trustee’s general bankruptcy counsel, Schwartzer & McPherson Law Firm. (See
 19 Maclean Declaration.)

20 In this case, Proposed Special Counsel and the estate both have a shared interest in
 21 maintaining the value of the estate’s patent rights, so the interests of the involved parties in this
 22 situation are aligned.

23 **III. Compensation Arrangement**

24 No payments have been made or promised to Proposed Special Counsel for services
 25 rendered in any capacity whatsoever in connection with the Chapter 7 Case. (See Maclean
 26 Declaration.)

27 There is no agreement or understanding between Proposed Special Counsel or any other
 28 entity for the sharing of compensation to be received for services rendered in or in connection with
 this Chapter 7 case, except that funds will be advanced by the firm to foreign associates (foreign
 law firms and/or specialized annuity companies) that will transmit the actual fee payments to the
 respective governments. No additional compensation will be paid to Proposed Special Counsel

1 except as authorized by order of this Court, after notice and an opportunity for a hearing. (See
 2 Maclean Declaration.)

3 Proposed Special Counsel has not received and are not holding any retainer or advance
 4 payment for services as Trustee's special litigation counsel in this case. The proposed total (USD
 5 \$13,000.00) is based on flat rates by the agencies and governments involved. There is no time-
 6 based component, and such pricing is typical and the custom for international patent firms. (See
 7 Maclean Declaration.)

8 The Trustee has determined that it will be economical and consistent with the purposes and
 9 policies of the Bankruptcy Code to retain Proposed Special Counsel as special counsel with an
 10 advance payment in the sum of USD\$13,000.00 that will cover all of the firm's legal fees and
 11 costs, government fees, and payments to foreign associates for administration of the various patent
 12 rights. Proposed Special Counsel has agreed to continue to maintain the patent rights on these
 13 terms. (See Maclean Declaration.)

14 The Trustee believes the proposed fee is reasonable and is beneficial to the estate and its
 15 creditors. The Trustee has concluded that under these circumstances, employment of Proposed
 16 Special Counsel on the proposed terms is appropriate.

17 **IV. Nunc Pro Tunc Employment**

18 Employment of counsel *nunc pro tunc* is permitted in limited circumstances. In re Atkins,
 19 69 F.3d 970 (9th Cir. 1995). At a minimum, the subject professionals "must (1) satisfactorily
 20 explain their failure to receive prior judicial approval [of their employment]; and (2) demonstrate
 21 that their services benefitted the bankruptcy estate in a significant manner." In re Atkins, 69 F.3d
 22 at 974 and 975–76, citing Halperin v. Occidental Fin. Grp., Inc. (In re Occidental Fin. Grp., Inc.),
 23 40 F.3d 1059, 1062 (9th Cir.1994); and Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.), 837
 24 F.2d 389, 392 (9th Cir.1988).

25 Proposed Special Counsel has extensive experience in the area of international patent
 26 rights, and is best qualified to continue to provide this service, but it was uncertain if the Trustee
 27 would continue to operate the business, so the Trustee did not seek employment of the firm until
 28 that determination had been made and also approved by the Court. Proposed Special Counsel has

1 already provided extensive service and will continue to assist the Trustee which will result in a
2 substantial benefit to the bankruptcy estate. *Nunc pro tunc* employment of the firm to June 8,
3 2018, will ensure there will be no lapse in maintenance of the estate's patent rights. (See Maclean
4 Declaration.)

5 **CONCLUSION**

6 Based upon the foregoing, the Trustee requests:

- 7 1. Authority to engage the law firm of Cassan Maclean as special counsel to the
8 Trustee *nunc pro tunc* to June 8, 2018, for the purpose of maintaining the
9 bankruptcy estate's patent and related rights set forth in **Exhibit "1;"** and
- 10 2. Authority to advance USD\$13,000 to the law firm of Cassan Maclean for said
11 patent maintenance listed in **Exhibit "1;"** and
- 12 3. Such further relief as the Court may allow.

13 Pursuant to Local Rule 9021, a proposed form of order is attached as **Exhibit "2."**

14 DATED: June 8, 2018.

15 /s/ Jason A. Imes

16 Jason A. Imes, Esq.
17 Schwartzer & McPherson Law Firm
18 2850 South Jones Boulevard, Suite 1
19 Las Vegas, Nevada 89146
20 *Attorneys for Lenard E. Schwartzer, Trustee*

EXHIBIT “1”

Medizone International Inc.					
CM REF.	TITLE	COUNTRY	ACTION	DUe DATE	ESTIMATED AMOUNT DUE (\$CAD)
42743-0009	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	CANADA	ANNUITY DUE	05-Jul-18	\$400.00
42743-0017	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	BRAZIL	ANNUITY DUE	05-Jul-18	\$1,250.00
42743-0018	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	CHINA	ANNUITY DUE	05-Jul-18	\$1,200.00
42743-0023	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	SINGAPORE	ANNUITY DUE	05-Jul-18	\$1,350.00
42743-0038, -0039, -0040	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	EUROPE (UK, FRANCE, GERMANY)	ANNUITY DUE	05-Jul-18	\$3,700.00
42743-0017	HEALTHCARE FACILITY DISINFECTION PROCESS AND SYSTEM WITH OXYGEN/OZONE MIXTURE	BRAZIL	ISSUE FEE	07-Jul-18	\$2,000.00
42743-0033	SPORTS EQUIPMENT AND FACILITY DISINFECTION	CANADA	ANNUITY DUE	07-Sep-18	\$400.00
42743-0028	SPORTS EQUIPMENT AND FACILITY DISINFECTION	US	1ST MAINT FEE DUE	30-Sep-18	\$1,700.00
42743-0035, -0036, -0037	BIO-TERRORISM COUNTERACTION USING OZONE AND HYDROGEN PEROXIDE	EUROPE (GERMANY, FRANCE, UK)	ANNUITY DUE	30-Sep-18	\$3,700.00

EXHIBIT “2”

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13 *Attorneys for Lenard E. Schwartzer, Trustee*

14 **UNITED STATES BANKRUPTCY COURT**

15 **DISTRICT OF NEVADA**

16 In re:
 17 MEDIZONE INTERNATIONAL, INC.,

18 Debtor.

19 Case No. BK-S-18-12662-LEB
 20 Chapter 7

21 [PROPOSED] ORDER GRANTING
 22 APPLICATION TO EMPLOY
 23 CASSAN MACLEAN AS
 24 SPECIAL LITIGATION COUNSEL
 25 FOR MAINTENANCE OF
 26 PATENT RIGHTS PURSUANT TO
 27 11 U.S.C. §327(e)

28 Hearing Date: July 19, 2018
 29 Hearing Time: 11:00 a.m.

30
 31 The Trustee's *Application to Employ Cassan Maclean as Special Litigation Counsel for*
 32 *Maintenance of Patent Rights Pursuant to 11 U.S.C. §327(e)* (the "Application") having come
 33 before this Court on the 19th day of July, 2018; Lenard E. Schwartzer, Chapter 7 Trustee (the
 34 "Trustee") appearing by and through his counsel, Jason A. Imes., Esq., of the Schwartzer &
 35 McPherson Law Firm; the Court having reviewed the Application, there being no opposition filed,
 36 and the Court being satisfied that proposed special litigation counsel, CASSAN MACLEAN,

1 represents no interest adverse to the Trustee or the estate of the debtor in this matter, that its
2 employment is necessary and would be in the best interests of the estate, and good cause
3 appearing,

4 **IT IS HEREBY ORDERED** that the Trustee's Application is GRANTED; and

5 **IT IS FURTHER ORDERED** that the Trustee is authorized to employ the law firm of
6 CASSAN MACLEAN as special counsel to the Trustee *nunc pro tunc* to June 8, 2018, pursuant to
7 11 U.S.C. §327(e) for the purpose of maintaining the bankruptcy estate's patent and related rights
8 set forth in attached **Exhibit "1"** pursuant to the terms set forth with more particularity in the
9 Application; and

10 **IT IS FURTHER ORDERED** that the Trustee is authorized to advance the sum of
11 USD\$13,000 to the law firm of CASSAN MACLEAN for said patent maintenance.

12 **IT IS SO ORDERED.**

13 Submitted by:

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16 Jason A. Imes, Esq.
17 Schwartz & McPherson Law Firm
18 2850 South Jones Blvd., Suite 1
19 Las Vegas NV 89146
20 *Attorneys for Trustee*

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

- The court waived the requirement of approval under LR 9021(b)(1).
- No party appeared at the hearing or filed an objection to the motion.
- I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated above.
- I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objection to the form or content of the order.

Jason A. Imes, Esq.
Schwartz & McPherson Law Firm

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